STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
OTU A. AND CAROL O. OBOT	:	ORDER DTA NO. 816007
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1993.	:	

Petitioners, Otu A. and Carol O. Obot, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law.

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on March 18, 1998 at 1:15 P.M. Petitioners failed to appear. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Peter T. Gumaer , Esq., of counsel).

A Default Order was mailed to petitioners on June 4, 1998, and petitioners made a request by written application that the default determination be vacated.

FINDINGS OF FACT

1. On August 6, 1997, the Division of Tax Appeals received a petition from Otu A. and Carol O. Obot. In the petition, petitioners argued that, pursuant to Tax Law § 612(c)(13), "we are entitled to deduct amount of State Taxes included and reported as income, on a prior New York State Personal Income Tax Return." They also alleged several procedural errors made by the Division of Taxation which they characterized as "bad faith" and a "denial of due process."

2. On October 9, 1997, the Division of Taxation ("Division") filed an answer to the petition, denying petitioners' claims and stating that petitioners overstated itemized deductions on their 1993 resident income tax return.

3. On November 18, 1997, the calendar clerk of the Division of Tax Appeals sent a notice to schedule hearing to petitioners and the Division's attorney, Peter T. Gumaer, Esq., directing them to set a mutually convenient date for hearing during the months of March or April 1998. The calendar clerk was to be advised of the date by December 29, 1997.

4. Neither petitioners nor the Division responded in any way to the notice to schedule, and, as the parties were advised, the Division of Tax Appeals selected the hearing date.

5. On February 9, 1998, Daniel J. Ranalli, Assistant Chief Administrative Law Judge, sent a Notice of Hearing to petitioners informing them that a hearing on their petition had been scheduled for Wednesday, March 18, 1998 at 1:15 P.M. in Troy, New York.

6. On the date of the hearing the Division of Tax Appeals received an envelope from Mr. Obot. There were two letters in the envelope dated February 28, 1998, but the envelope was postmarked March 16, 1998. The first letter was addressed to the calendar clerk and was a late response to the November notice to schedule hearing. In it petitioners requested that the hearing be held in Buffalo due to "hardship and inconvenience." The second letter was addressed simply to "Administrative Law Judge" and was a formal request for change of venue from Troy to Buffalo. The letter also requested travel, lodging and meal vouchers for travel to and from Troy. The Division of Tax Appeals attempted, unsuccessfully, to contact petitioners by telephone.

7. On March 18, 1998, at 1:25 P.M., Administrative Law Judge Jean Corigliano called the matter for hearing. Petitioners did not appear. Mr. Gumaer appeared for the Division and moved that a default order be issued to petitioners for their failure to appear.

8. On March 31, 1998, Chief Administrative Law Judge Andrew Marchese wrote to petitioners in response to their correspondence received on the day of the hearing. He advised them that the Division of Tax Appeals did not conduct administrative law judge hearings in Buffalo and did not provide travel funding to any petitioners. He also advised petitioners that a motion for default had been made and that the administrative law judge would be ruling on the motion shortly. As an alternative to a default order Judge Marchese offered petitioners the opportunity to transfer their case to small claims which would allow for a hearing in Buffalo. He further advised petitioners that a small claims determination would be final, with no appeal rights for either party. Judge Marchese allowed petitioners until April 17, 1998 to respond to his offer.

9. By letter dated April 8, 1998, Mr. Obot declined Judge Marchese's offer to avoid a default order by agreeing to transfer petitioners' case to small claims. Instead, Mr. Obot repeated his argument that he should be allowed to have an administrative law judge hearing in Buffalo. He also maintained that the Division had not furnished him with documents he had requested to substantiate its assessment.

10. On June 4, 1998, Judge Corigliano issued a default determination against petitioners.

11. On June 10, 1998, petitioners filed an application to vacate the default determination. In the application petitioners again raised the argument that they should not be penalized for failure to appear at the hearing because they "could not afford to travel to expensive and remote Administrative Hearing Locations. . . ." Petitioners also argued that the supervising administrative law judge "should move on his own Motion to Dismiss charges against Petitioners due to continued lack of cooperation from the Department of Taxation and Finance, in submitting requested documents and accompanying information. . . ."

12. The Division responded to the application in a letter dated June 17, 1998 stating that petitioners had been given an adequate opportunity to proceed in a small claims hearing and that they elected to proceed with an administrative law judge hearing which was to be held in Troy. The Division also argued that petitioners had failed to demonstrate the criteria needed to vacate a default determination.

CONCLUSIONS OF LAW

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal, "In the event a party or the party's representative does not appear at a scheduled hearing and an adjournment has not been granted, the administrative law judge shall, on his or her own motion or on the motion of the other party, render a default determination against the party failing to appear." (20 NYCRR 3000.15[b][2].) The rules further provide that: "Upon written application to the supervising administrative law judge, a default determination may be vacated where the party shows an excuse for the default and a meritorious case." (20 NYCRR 3000.15[b][3].)

B. There is no doubt on the record presented in this matter that petitioners did not appear at the scheduled hearing or obtain an adjournment. It is doubtful whether the letter received at the Division of Tax Appeals on the morning of the hearing could even be construed as an adjournment request; however, even if it were so construed, it remains that no adjournment was granted. Therefore, the Administrative Law Judge correctly granted the Division's motion for default pursuant to 20 NYCRR 3000.15(b)(2) (***see, Matter of Zavalla***, Tax Appeals Tribunal, August 31, 1995; ***Matter of Morano's Jewelers of Fifth Avenue***, Tax Appeals Tribunal, May 4, 1989). Once the default order was issued, it was incumbent upon petitioners to show a valid excuse for not attending the hearing and to show that they have a meritorious case (20 NYCRR

3000.15[b][3]; ***see also, Matter of Zavalla***, ***supra***; ***Matter of Morano's Jewelers of Fifth Avenue***, ***supra***).

C. Petitioners have not established a valid excuse for their failure to appear at the hearing. The sole reason given for the default is that petitioners allege that they could not afford the trip to Troy. Nowhere in the Tax Law or the regulations is there an absolute right given to petitioners to have a hearing at the location of their choice. In fact Tax Law § 2006(15) grants to the Tribunal the power, function and duty "to have all other powers and perform such other duties as are necessary and proper to operate and administer the division of tax appeals consistent with the purposes of such division described in [article 40]." Such operational powers and duties certainly include the authority to designate hearing locations. Petitioners were well aware that if they wanted to have a hearing before an administrative law judge that hearing would be held in Troy. Knowing this, they still did not appear at the hearing. Even after their failure to appear, when they were given the opportunity to have a small claims hearing in Buffalo, they would not avail themselves of this alternative to having a default order issued. Accordingly, petitioners have failed to meet the first criterion to have the default order vacated.

D. Petitioners have also failed to establish a meritorious case. Nowhere in the pleadings or in the application to vacate the default order is there a clear explanation of just what petitoners are arguing, much less an explanation of how they intend to prove their case. The only issue set forth in the petition is the claim that petitioners are entitled to deduct State taxes "included and reported as income on a prior New York State Personal Income Tax Return." This statement is rather vague in that it does not specify what State taxes petitioners wish to claim as a deduction. If they are referring to State income taxes, this deduction is specifically disallowed by Tax Law § 612(b)(3). In their petition, petitioners cite to Tax Law § 612(c)(13) which references Tax Law

§ 612(i). The latter section concerns a depletion allowance for mines and oil and gas wells. This does not appear to be what petitioners are referring to when they argue that they should have been allowed a deduction for State taxes. In any event, it is their burden to prove that they are entitled to a specific deduction (Tax Law § 689[e]) and they have clearly failed to demonstrate in their application to vacate the default order that they would be able to meet this burden if they were granted a hearing.

E. It is ordered that the request to vacate the default order be, and it is hereby, denied and the Default Determination issued June 4, 1998 is sustained.

DATED: Troy, New York
July 9, 1998

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ASSISTANT CHIEF ADMINISTRATIVE LAW JUDGE